SUPREME COURT, U. S.

APR 9 1974

MICHAEL RODAK, JR., CLERK

No. 73-1050

In the Supreme Court of the United States

OCTOBER TERM, 1973

VELMA ROSE BIGHEART, PETITIONER

v.

JOHN PAPPAN, SUPERINTENDENT OF THE OSAGE INDIAN AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
WALLACE H. JOHNSON,
Assistant Attorney General,
CARL STRASS,
TERRENCE L. O'BRIEN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1050

VELMA ROSE BIGHEART, PETITIONER

v.

JOHN PAPPAN, SUPERINTENDENT OF THE OSAGE INDIAN AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. E, A26–A31) is reported at 482 F. 2d 1066. The opinion of the district court (Pet. App. D, A21–A25) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1973 (Pet. App. E, A26). A timely petition for rehearing was denied on September 21, 1973 (Pet. App. F, A32). On December 20, 1973, Mr.

536 444—74

Justice Marshall extended the time for filing a petition for a writ of certiorari to January 5, 1974. The petition was filed on January 4, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Act of April 18, 1912, 37 Stat. 86, and the Act of February 27, 1925, 43 Stat. 1008 (as amended), limiting the devolution of property of Osage Indians held in trust by the United States to heirs of Indian blood, are constitutionally valid.

2. Whether those statutes were properly applied in this case to uphold the will of a deceased Osage Indian who did not leave to his estranged non-Indian wife the portion of his restricted estate generally required by Oklahoma law.

STATUTES INVOLVED

Section 8 of the Act of April 18, 1912, 37 Stat. 86, provides as follows:

> Sec. 8. That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will, in accordance with the laws of the State of Oklahoma: *Provided*, That no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior.

Section 7 of the Act of February 27, 1925, 43 Stat. 1008, as amended by the Act of September 1, 1950, 64 Stat. 572, provides:

> SEC. 7. Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe of Indians any right, title, or interest to any restricted lands, moneys, or mineral interests of the Osage Tribe: *Provided*, That (except in cases where a person claiming as such heir is a party to judicial proceedings pending on the date of the enactment of this proviso in which the claimant has filed a formal pleading alleging Indian blood) no claim of heirship shall be recognized unless the claimant shall establish that he is a citizen of the United States and is enrolled on a membership, census, or other roll prepared under the direction of the Secretary of the Interior, or has a lineal Indian ancestor so enrolled. *Provided further*, That this section shall not apply to spouses under marriages existing on February 27, 1925.

STATEMENT

William Bigheart, Jr. (Bigheart), an enrolled Osage Indian of at least one-half Osage blood,[1] died testate.

[1] Pet. App. C, A10–A11. Petitioner contests the administrative finding that Bigheart was of one-half (or more) Osage blood. Petitioner does not assert that Bigheart is less than half-blood Osage, but argues that he was not proved to have been of one-half or more Osage blood in the proceedings below. So far as we can determine, however, petitioner did not challenge the decedent's bloodlines in the administrative hearings. Moreover, Section 3 of the Act of March 3, 1921, 41 Stat. 1249, required the Secretary of the Interior to make a determination of the Indian blood of Osage Indians. Department records indi-

Section 8 of the Act of April 18, 1912 (hereafter the 1912 Act) requires Secretarial approval of any Osage will disposing of restricted property before the will can be admitted for probate in the Oklahoma courts. Pursuant to the 1912 Act a hearing was conducted under Department of the Interior procedures to consider Bigheart's most recent will dated June 27, 1967, and a codicil of July 7, 1967, which disposed of his restricted property (Pet. App. E, A27–A28). Those instruments revoked prior wills and codicils, provided a monthly payment to Bigheart's mother during her lifetime, and left the bulk of his estate to his children, substantially disinheriting petitioner, his estranged non-Indian wife, leaving her only ten dollars (*ibid.*).

At the hearing, petitioner contested Bigheart's mental capacity at the time of the 1967 will and codicil and sought Secretarial approval of a prior will dated November 15, 1965, which left a substantial portion of his estate to her (Pet. App. E, A27). The 1967 will and codicil were approved and the 1965 will disapproved (Pet. App. A & B, A1–A8). After an extensive administrative appeal (Pet. App. C, A9–A20),[2] peti-

---

cate that Bigheart's grandfather and father were whole-blood Osage Indians. The Act of February 5, 1948, 62 Stat. 18, required the Secretary to issue a certificate of competency to members of the Osage tribe of less than one-half Indian blood. Bigheart had no such certificate. His lineage is thus a matter of department records, obviously noticed by the hearing examiner. See *Knight* v. *U.S. Land Association*, 142 U.S. 161, 169.

[2] Petitioner received administrative consideration even beyond the proceedings shown in the Appendix to the petition. Her request for reopening of the administrative appeal was considered, then denied, and the Acting Secretary responded to specific complaints she tended directly to him.

tioner sought judicial review of the Secretary's decision and a declaration that she is entitled to elect against the will in accordance with Oklahoma law.[3] She also sought a declaration of the unconstitutionality of the Act of February 27, 1925, 43 Stat. 1008, as amended by the Act of September 1, 1950, 64 Stat. 572 (hereafter the 1925 Act), which, even if the wills were invalid, would still prohibit her, as a non-Indian, from inheriting Osage-restricted property.

The district court found the Secretary's decision upholding the will to be supported by substantial evidence and concluded that the relevant statutes were constitutional and operated to the exclusion of contrary state law (Pet. App. D, A21–A25). The court of appeals affirmed (Pet. App. E, A26–A31).

ARGUMENT

The arguments advanced by petitioner do not warrant review by this Court. The court of appeals' decision rests on established principles of law, has limited application, and does not conflict with decisions of this Court or other courts of appeals.

1. The constitutional issue raised by petitioner has previously been resolved against her contentions. *Simmons* v. *Eagle Seelatsee*, 384 U.S. 209, affirming 244 F. Supp. 808 (E. D. Wash.). In that case a statute nearly identical to the 1925 Act, but applicable to the devolution of restricted property of the Yakima Tribe, was attacked as unconstitutional on the ground that by restricting inheritance of trust

[3] The Oklahoma laws providing a forced portion for a spouse are excerpted at Pet. 4–5.

property to persons of Indian blood it created an unconstitutional racial classification. The three-judge district court held the Act to be a constitutionally valid exercise of Congress' plenary power over tribal property and relations (244 F. Supp. at 813). It found the Act's references to percentages of Indian blood to be necessary measures in determining tribal membership and in legislating as to tribal affairs (*id.* at 814). This Court summarily affirmed, 384 U.S. 209. See also *Brader* v. *James*, 246 U.S. 88; *Ute Indian Tribe of the Uintah and Ouray Reservation* v. *Probst*, 428 F. 2d 491 (C.A. 10), certiorari denied, 400 U.S. 926.

2. Petitioner is not entitled to the forced-share of the decedent's estate she claims under state law. Congress has legislated to the contrary with respect to the devolution of Osage trust properties. Osage Indians may dispose of their restricted property by a will approved by the Secretary of the Interior (1912 Act). However, non-Indians are precluded from taking an intestate share from the restricted estate of a deceased, at least half-blood, Osage Indian (1925 Act) and, *a fortiori*, a non-Indian spouse is precluded from electing against the will of such an Indian, the Oklahoma forced-share statute notwithstanding. See *Blanset* v. *Cardin*, 256 U.S. 319. State law, of course, must give way to federal law in an area of federal competency. Const. Art. VI Cl. 2.[4]

[4] The Oklahoma courts have understood and applied the controlling federal law in the area of Indian inheritance. *Ware* v. *Beach*, 322 P. 2d 635 (Okla.), certiorari denied, 358 U.S. 819; *Mashunkashey* v. *Mashunkashey*, 191 Okl. 501, 134 P. 2d 976; *In re Smith's Estate*, 188 Okl. 158, 107 P. 2d 188; *In re Mar-*

The administrative findings that Bigheart's will, which, but for $10, excluded his estranged wife and divided his estate between his mother and his two children, was not unnatural, and that he had testamentary capacity at the execution of his will, are supported by the record. Administrative review and subsequent review of the entire administrative record by the district court and the court of appeals resulted in unanimity of opinion that the initial decision was supported by substantial evidence. See *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 618–621. That finding cannot be overturned simply because a contestant considers the will's provisions to be unfair or inequitable. Compare *Tooahnippah* v. *Hickel*, 397 U.S. 598, 607–610.[7]

---

tin's Estate, 183 Okl. 177, 80 P. 2d 561. The cases cited by petitioner, *Soderstrom* v. *Bonner*, 180 Okl. 355, 71 P. 2d 117; *Record* v. *Record*, 178 Okl. 524, 63 P. 2d 973, as the court of appeals stated (Pet. App. E. A31), are inapposite.

[7] Petitioner's reliance on two civil rights Acts, Section 16 of the Act of May 31, 1870, 16 Stat. 140, 144, 42 U.S.C. 1981, and Section 1 of the Act of April 9, 1866, 14 Stat. 27, 42 U.S.C. 1982, is misplaced. The 1925 Act is a permissible exercise of the plenary power of Congress to control Indian trust properties. It is an attempt to preserve Indian properties for Indians. Discrimination, of the sort prohibited by the cited civil rights Acts, is not at issue here, see *Simmons* v. *Eagle Seelatsee*, *supra*. Moreover, the 1925 Act is a specific Act, passed by Congress after the more general 1870 Act and is thus, in the absence of constitutional infirmity, controlling.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
WALLACE H. JOHNSON,
Assistant Attorney General.
CARL STRASS,
TERRENCE L. O'BRIEN,
Attorneys.

APRIL 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974